

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

253
BRIEF FOR APPELLANT

611

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,915

GEORGE E. JOHNSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FOR THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED 35010 1964

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QUESTION PRESENTED

Whether the District Court committed prejudicial and reversible error affecting substantial rights of the appellant when it submitted to the jury the case of alleged unauthorized use of a motor vehicle where proof of the use was based entirely upon the testimony of the arresting officer, even though no motion was made by appellant for a judgment of acquittal.

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,915

GEORGE E. JOHNSON,
Appellant,

v.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

On July 6, 1964, an indictment was returned charging appellant in one count with the unauthorized use of a motor vehicle. The United States District Court for the District of Columbia had jurisdiction by virtue of Section 306 of Title 11 of the District of Columbia Code (1961 ed.).

Appellant was arraigned on July 10, 1964, and entered a plea of not guilty. Trial by jury was

commenced before District Judge Spootswood W. Robinson III on August 18, 1964, and concluded on the same day. On August 18, 1964, the jury returned a verdict of guilty as charged (unauthorized use of a motor vehicle). On September 4, 1964, appellant was sentenced to imprisonment for a period of twenty (20) months to sixty (60) months, said sentence to run concurrently with the sentence then being served by the defendant under a judgment of the District of Columbia Court of General Sessions. This appeal, which the District Court allowed without prepayment of costs, is from this verdict of guilty and from the judgment and commitment thereupon filed.

This Court has jurisdiction of the appeal by virtue of 28 U.S.C., Section 1291.

STATEMENT OF THE CASE

Appellant was found guilty on the indictment which charged him with unauthorized use of a motor vehicle, in violation of Section 2204 of Title 22 of the District of Columbia Code (1961 ed.).

For the purpose of proving this offense, the Government at the outset of the trial offered evidence through Richard Farmer as to the ownership, custody and disappearance of his 1956 Oldsmobile from the parking lot in front of his apartment. While the witness stated that he did not know appellant nor give anyone permission to move the automobile, he did not testify that appellant took the car. (Tr. 8-10 and 12)

Next, Private Tyson Joliffed of the Metropolitan Police Department testified that on June 10, 1964, some time between 1:30 and 2:00 A.M. from his scout car he observed an Oldsmobile with a right headlamp out and not burning. He attempted to stop the Oldsmobile on the basis of the one headlight not burning, but it fled and

he gave chase. During the chase, the Oldsmobile attempted to make a left turn, struck a lamppost and backed into the scout car. The witness further testified that he got out of the scout car and ran to the passenger's side of the Oldsmobile. The driver, according to the witness, slid to the driver's side and fled. The witness gave chase for several blocks, both on foot and in a commandeered car. (Tr. 14-16)

The further testimony of the witness indicated that although he felt he was able to identify the appellant as the driver of the car, he lost sight of the driver during the chase, and the affair occurred in the dark hours in a section where there were the old fashioned variety of street lights. He was not able to recall with certainty what the driver was wearing. No fingerprints were produced, nor was appellant otherwise physically linked with the car. (Tr. 38, 34, 35, 37, 39)

At the close of the Government's case and after argument and instructions to the jury, the case was submitted to the jury on the foregoing testimony. (Tr. 77)

STATEMENT OF POINTS

The District Court erred in submitting to the jury the case based for an essential element entirely on the testimony of the arresting officer, which did not constitute substantial evidence that the appellant was the driver of the motor vehicle.

With respect to this point, appellant desires that the Court read the following pages of the reporter's transcript: Tr. 13-17 and 33-40

SUMMARY OF ARGUMENT

To establish the essential element of use in the offense of unauthorized use of a motor vehicle, the Government based its case entirely on the testimony of one witness, the arresting officer. The apprehension was made after the witness had lost sight of the driver of the motor

vehicle during a chase and under such other circumstances where the testimony should be received with caution. The uncorroborated word of the arresting officer under these particular circumstances could not establish beyond a reasonable doubt that the appellant was guilty of this offence.

Even though no motion for an acquittal was made by appellant, the District Court's submission of the case to the jury where there was no substantial evidence, unquestionably affected the substantial rights of appellant within the meaning of the plain error rule.

ARGUMENT

I

THE TESTIMONY OF A SINGLE POLICE OFFICER WHO
MADE THE ARREST AFTER A CHASE AND LOSING SIGHT
OF THE FUGITIVE IN THE DARK HOURS WAS
INSUFFICIENT EVIDENCE TO SUSTAIN A CON-
VICTION OF UNAUTHORIZED USE OF A MOTOR VEHICLE

To establish the essential element of use of the motor vehicle the Government's case rests entirely upon the testimony of the arresting officer. He testified that after he had given

chase to an automobile, his scout car was rammed by that automobile. Then the driver of the automobile fled on foot into the darkness of the night.

(Tr. 15-16) He gave chase both on foot and in a commandeered car, but lost sight of the driver.

(Tr. 15, 38) Later, some distance away, he apprehended the appellant who, the officer said, was the driver of the automobile. (Tr. 38) However, the witness could not recall the driver's dress nor was there any physical evidence, such as fingerprints, linking the appellant to the car.

(Tr. 39) Naturally, the officer was apprehensive about losing the driver of the automobile he was chasing, and it was the appellant's unfortunate plight to be in the officer's path and be apprehended. This witness's testimony under such circumstances should be examined with care and not taken alone as sufficient evidence for conviction.

It is well established that if there is no substantial evidence upon which a conviction may be based, the case should not go to the jury. Rule

29(a) of the Federal Rules of Criminal Procedure provides in part that:

"The Court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses." (Rule 29(a), Federal Rules of Criminal Procedure, 18 U.S.C.A.)

For determination of sufficiency of evidence, this Court has enunciated the following standard:

"The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weight the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or, to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter. (Curly v. United States, 81 U.S. App. D.C. 389, 392, 160 F.2d 229, 232-233 (1947))

This Court on a number of occasions has held that the uncorroborated testimony of one witness is insufficient evidence to support a conviction.

(Kelly v. United States, 90 U.S. App. D.C. 125, 194, F.2d 150 (1952) and cases cited therein) In Kelly v. United States, at page 130, the Court stated that:

"It seems to us that the uncorroborated word of this particular officer under these particular circumstances could not establish beyond a reasonable doubt that this defendant was guilty of this offense. The inescapable doubts are reasonable ones. We have many times reviewed the sufficiency of the evidence in criminal cases and have upon occasion reversed for lack of sufficient evidence to convict."

More recently this court has held that the testimony of the complaining witness is insufficient to establish the corpus delicti. (Wilson v. United States, 106 U.S. App. D. C. 226, 271 F.2d 492 (1959); Farrar v. United States, 107 U.S. app. D.C. 204, 275 F.2d 868 (1960))

. II

WHERE THERE WAS INSUFFICIENT EVIDENCE TO SUSTAIN A
CONVICTION FAILURE OF THE DISTRICT COURT, EVEN
THOUGH NOT REQUESTED, TO ORDER THE ENTRY OF A
JUDGMENT OF ACQUITTAL CONSTITUTED PLAIN ERROR
AFFECTING THE SUBSTANTIAL RIGHTS OF THE APPELLANT

The failure of the District Court to order the entry of a judgment of acquittal after the evidence was closed, where such evidence was insufficient to sustain a conviction, was plain error affecting the substantial rights of the appellant and may be noticed by this court although it was not brought to the attention of the District Court. Rule 52(b) of the Federal Rules of Criminal Procedure provides as follows:

"Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." (Rule 52(b), Federal Rules of Criminal Procedure, 18 U.S.C.A.)

This court has held that the failure of counsel to request that the issue of sanity be submitted to the jury would not preclude the appellate court from reviewing this question under the plain error rule

(Tatum v. United States, 88 U.S. App. D.C. 386, 190 F.2d 612 (1951)), and the inadmissibility of a confession has been considered by this court, although not objected to. (Peyton v. United States, 96 U.S. App. D.C. 1, 222 F.2d 794 (1951)). Likewise, in a prosecution for taking indecent liberties with a female child, where evidence of guilt was circumstantial and not altogether clear, reversal was required for admission of hearsay testimony notwithstanding that there was no objection to the testimony. (Pinkard v. United States, 99 U.S. App. D.C. 394, 240 F.2d 632 (1957)) In the Fifth Circuit where the Government had urged that the sufficiency of the evidence was not before the court for review because the appellant had not made a motion for acquittal at the close of all of the evidence in the prosecution for concealment and transportation of untaxed distilled spirits, the Court held that under the circumstances there presented, a review of the evidence under the plain error rule was warranted. (Clark v. United

States 5 Cir., 293 F.2d 455 (1961))

On the basis of the foregoing, the District Court's failure to direct an acquittal, even though not requested, certainly affects the substantial rights of appellant within the meaning of Rule 52(b) of the Federal Rules of Criminal Procedure and is subject to review by this Court.

CONCLUSIONS

For the foregoing reasons, it is submitted that the conviction of appellant should be reversed.

Respectfully submitted,

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APPENDIX

STATUTES, TREATIES, REGULATIONS OR RULES INVOLVED

Title 22, District of Columbia Code, (1961 ed.)
Section 2204:

"Any person who, without the consent of the owner, shall take, use, operate, or remove, or cause to be taken, used operated, or removed from a garage, stable, or other building, or from any place or locality on a public or private highway, park, parkway, street, lot, field, inclosure, or space, an automobile or motor vehicle, and operate or drive or cause the same to be operated or driven for his own profit, use or purpose shall be punished by a fine not exceeding one thousand dollars or imprisonment not exceeding five years, or both such fine and imprisonment. (Feb. 3, 1913, 37 Stat. 656, ch. 23 § 826b, as added Feb. 3, 1913, 37 Stat. 656, ch. 23, §1."

Rule 29(a), Federal Rules of Criminal Procedure,
18 U.S.C.A.:

"Motion for Judgment of Acquittal. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. The court on motion of a defendant or of its own motion shall order the entry of judgment of acquittal of one or more offenses charged in the indictment or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses. If a defendant's motion for judgment of acquittal at the close of the evidence offered by the government is not granted, the defendnat may offer evidence without having reserved the right.

Rule 52(b), Federal Rules of Criminal Procedure,
18 U.S.C.A.:

". . . Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

SUPPLEMENTAL BRIEF FOR APPELLANT

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,215

GEORGE E. JOHNSON,
Appellant

v.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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United States Court of Appeals
for the District of Columbia Circuit

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* <u>Jones v. United States</u> , D.C. Circ. No. 18,410 decided Oct. 15, 1964 338 F.2d. 553.	8
<u>McDonald v. United States</u> , 109 App. D.C., 98, 284 F.2d 232 (1960)	9
* <u>Nanfito v. United States</u> , 20 F.2d 376 (8th Cir. 1927)	8

*Cases or authorities chiefly relied upon are marked
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QUESTIONS PRESENTED

Whether the District Court committed prejudicial and reversible error affecting substantial rights of the appellant when it instructed the jury on reasonable doubt in terms of an abiding conviction of the defendant's guilt such as the jurors would be willing to act upon in their more weighty personal affairs, rather than in terms of the type of doubt that would cause the jurors to hesitate to act in their more weighty personal affairs.

Whether the substantial rights of the appellant were prejudiced by the suggestion of the prosecuting attorney in his closing argument that the testimony of the chief prosecuting witness was corroborated by the failure of the defense counsel to use Jencks Act statements in his possession to impeach the witness.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

No. 18,915

GEORGE E. JOHNSON
Appellant,

v.

UNITED STATES OF AMERICA
Appellee.

SUPPLEMENTAL BRIEF OF APPELLANT

INTRODUCTION

This supplemental brief is submitted in response to the Court's order dated February 18, 1965, providing an opportunity for appointed defense counsel to develop and brief the additional issues raised on the record as follows:

1. In his closing arguments the prosecuting attorney suggested that the testimony of the chief prosecuting witness was corroborated by the failure of the defense counsel to use Jencks Act statements in his possession to impeach the witness.

2. The trial judge instructed the jury on reasonable doubt in terms of an abiding conviction of the defendant's guilt such as the jurors would be willing to act upon in their more weighty personal affairs, rather than in terms of the type of doubt that would cause the jurors to hesitate to act in their more weighty personal affairs.

Since the appellant's original brief contained a jurisdictional statement and statement of the case, those will not be repeated here.

The first basis for error is to be found in the following instructions of the trial judge to the jury:

"The burden is on the Government to prove the defendant guilty beyond a reasonable doubt. Unless the Government sustains this burden and proves beyond a reasonable doubt that the defendant has committed every element of the offense with which he is charged, you must find the defendant not guilty.

However, proof beyond a reasonable doubt does not mean proof beyond any doubt whatsoever. It means proof to a moral certainty, and not necessarily proof to a mathematical or absolute certainty.

By a reasonable doubt, as the term implies, is meant a doubt based on reason, a doubt for which you can give a reason to yourself, and not just any whimsical speculation or capricious conjecture.

Proof beyond a reasonable doubt simply means this: If, after an impartial consideration and comparison of all of the evidence, you can say to yourself that you are not satisfied of the defendant's guilt, then you have a reasonable doubt.

On the other hand, if after an impartial consideration and comparison of all of the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt." (Tr. 64,65)

The second basis for error arises out of the following argument of the prosecuting attorney:

"The unhesitating identification of this defendant by Officer Joliffe, I think, ladies and gentlemen, proves this case beyond any reasonable doubt. He testified under oath that this defendant, who he had ample opportunity to observe just a few feet away, was in fact the man he chased and arrested several blocks away. In fact, this defendant breathing hard in a state of exhaustion corroborates the fact that this man had run a distance from the scene of the crime.

Further corroboration, ladies and gentlemen, may be found in the fact that I produced for the benefit of this defense counsel statements in writing made to other persons by the police officers; and was there one satisfactory effort made to impeach the Officer to suggest that what he had made in his official report is in any way different from his testimony at trial? There is no difference, ladies and gentlemen, in these reports made at the time of the crime. They corroborate the testimony of the police officer from the witness stand." (Tr. 56)

STATEMENT OF POINTS

The District Court erred in instructing the jury on reasonable doubt in terms of an abiding conviction of the defendant's guilt such as the jurors would be willing to act upon in their more weighty personal affairs, rather than in terms of the type of doubt that would cause the jurors to hesitate to act in their more weighty personal affairs.

With respect to this point, appellant desires the court to read the following pages of the reporter's transcript: Tr. 64,65.

The District Court erred in permitting the jury to consider the closing argument of the prosecuting attorney to the effect that the testimony of the chief prosecuting witness was corroborated by the failure of the defense counsel to use the Jencks Act statements in his possession to impeach the witness. With respect to this point, the appellant desires the Court to read page 56 of the reporter's transcript.

SUMMARY OF ARGUMENTS

The District Court improperly instructed the jury on reasonable doubt in terms of the kind of doubt that would make a person willing to act, rather than in terms which would make a person hesitate to act. The accused was entitled to clear and full instructions on reasonable doubt and the failure to give the proper instructions was plain error.

Although the Government's evidence to establish an essential element consisted solely of the testimony of a single police officer, the prosecuting attorney improperly attempted to strengthen this case by arguing to the jury that the officer's testimony was corroborated by the failure of the defense counsel to produce the officer's official report which had been made available to him. According to the prosecuting attorney, these reports were in no way different from the officer's testimony. The District Court's permitting this prejudicial and improper argument to be received by the jury was plain error.

ARGUMENT

I.

THE DISTRICT COURT ERRED IN INSTRUCTING THE JURY ON REASONABLE DOUBT IN TERMS OF THE KIND OF DOUBT THAT WOULD MAKE A PERSON WILLING TO ACT, RATHER THAN IN TERMS OF THE KIND OF DOUBT WHICH WOULD MAKE A PERSON HESITATE TO ACT.

The District Court instructed the jury that the burden is on the Government to prove the defendant guilty beyond a reasonable doubt and then proceeded to give its definition of "reasonable doubt" (Tr. 64). In amplifying this definition the Court stated as follows:

"On the other hand, if after an impartial consideration and comparison of all of the evidence, you can truthfully and candidly say to yourself that you have an abiding conviction of the defendant's guilt, such as you would be willing to act upon in the more weighty and important matters relating to your own affairs, then you have no reasonable doubt.

In other words, proof beyond a reasonable doubt is proof which will result in an abiding conviction on your part of the defendant's guilt, such a conviction that you would be willing to act upon in the more weighty and important matters relating to your own affairs." (Tr. 64, 65)

This Court and the Supreme Court on a number of occasions considered instructions similar to the foregoing and have consistently held that instructions to the jury on reasonable

doubt should be in terms of the type of doubt that would cause the jurors to hesitate to act in their more weighty personal affairs, rather than in terms of the District Court of an abiding conviction of the defendant's guilt such as the jurors would be willing to act upon in their more weighty personal affairs.

This Court clearly spelled out proper instructions on reasonable doubt in Egan v. United States, 55 App. D.C. 306, 393, 287 F. 958, 967 (1923) when it stated:

"The charge totally fails to define what constitutes reasonable doubt. To what purpose is it to tell the average jurymen that he must be satisfied from the evidence of the guilt of the accused beyond a reasonable doubt without some intelligent statement of its meaning? A reasonable doubt may be defined to mean such a doubt as will leave the juror's mind, after a candid and impartial investigation of all the evidence, so undecided that he is unable to say that he has an abiding conviction of the defendant's guilt, or such a doubt as in the graver and more important transactions of life, would cause a reasonable and prudent man to hesitate and pause."

This definition of "reasonable doubt" was approved by this Court in Bishop v. United States, 71 App. D.C. 132, 137-138, 107 F.2d 297, 303 (1939) when it stated that reasonable doubt "is not a vague, speculative, imaginary something, but just such a doubt as would cause reasonable men to hesitate to

act upon it in matters of importance to themselves."

The Supreme Court in Holland v. United States, 348 U.S. 121, 140, 75 S.Ct. 127, 138 (1954) approved the doctrine of the Bishop case that a charge of reasonable doubt should be in terms of the kind of doubt that would make a person hesitate to act, rather than the kind on which he would be willing to act.

More recently this Court in Jones v. United States, D.C. Circ., No. 18,410, decided October 15, 1964, 338 F. 2d. 553 disapproved instructions given by the trial court that were in terms of doubt that would make a person willing to act, rather than hesitate to act.

The instructions on reasonable doubt given by the District Judge would only confuse the jury and the substantial rights of the appellant were affected by the failure of the trial judge to properly instruct the jury. It is fundamental that an accused is entitled to clear and full instructions as to what is meant by the term reasonable doubt. Nanfity v. United States, 20 F.2d 376 (8th Cir. 1927). This Court has held in appropriate cases that the failure to properly instruct the jury is plain error. In Byrd v. United States, D. C. Circ., No. 18,896 decided on January 4, 1965, :

the trial judges' omission to instruct the jury on every essential element of the crime was held to be plain error. The failure to charge on the presumption of innocence was held to be plain error, even though not requested, in McDonald v. United States, 179 App. D.C. 98, 284 F. 2d 232 (1960). And the failure or refusal to charge the jury that the Government must prove each element beyond a reasonable doubt was reversible error under the holding in Johnson v. United States, 109 App. D.C. 333, 244 F.2d 781 (1957). It follows that improper and confusing instructions in the vital area of reasonable doubt could affect the outcome of the jury's deliberations to deprive the accused of the substantial right to have the Government prove him guilty beyond a reasonable doubt.

II.

IT WAS PLAIN ERROR FOR THE DISTRICT COURT TO PERMIT THE JURY TO CONSIDER THE PROSECUTING ATTORNEY'S IMPROPER ARGUMENT THAT IF THE DEFENSE COUNSEL HAD PRODUCED THE ARRESTING OFFICER'S OFFICIAL REPORTS, THEY WOULD HAVE CORROBORATED THE OFFICER'S TESTIMONY.

To establish the essential element of use of the motor vehicle the Government's case rests entirely upon the testimony of the arresting officer. To fortify this case, the prosecuting attorney stated in his closing argument that: "He had

produced for the benefit of this defense counsel statements in writing made to other persons by the police officer; and was there one satisfactory effort made to impeach the Officer to suggest that what he had made in his official report is in any way different from his testimony at trial? There is no difference, ladies and gentlemen, in these reports made at the time of the crime. The corroborate the testimony of the police officer from the witness stand." (Tr. 56)

There was no foundation laid for this argument by the evidence in the record. The prosecuting attorney was improperly through his argument to the jury stating facts based on his personal knowledge.

In Hall v. United States, 256 Fed. 748 (4th Cir. 1919) the court in holding that it was improper for the district attorney to base his argument upon his statement that no friend of defendant or citizen had appeared to testify in his behalf stated on page 752 as follows:

"In 2 Ruling Case Law, under title "Argument of Counsel" (page 420, Section 17), it is stated:

'Counsel should never in the course of argument state facts that are based on his own personal knowledge only. If he desires to get such facts before the jury, he should take the stand and present them in a legitimate manner; for although, in the heat of argument, fervor and partisanship

are to be expected from counsel, this cannot justify a departure from the field or argument and discussion of the facts disclosed by the evidence into the field of testimony to establish other facts.'

It was plain error for the District Court to permit this prejudicial and improper argument to be received by the jury.

On the basis of the foregoing, the District Court's failure to properly instruct the jury on reasonable doubt and the uncorrected improper conduct of the prosecuting attorney, certainly affected the substantial rights of the appellant and is subject to review by this Court.

CONCLUSIONS

For the foregoing reasons, it is submitted that the conviction of appellant should be reversed.

Respectfully submitted,

/s/ John Patten Abshire

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,915
(Cr. No. 612-64)

GEORGE E. JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

United States Court of Appeals
for the District of Columbia Circuit
Appellee.

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REPLY MEMORANDUM FOR APPELLANT

Nathan J. Paulson
CLERK

This memorandum is submitted in reply to the Supplemental Memorandum For Appellee filed on the 25th day of March, 1965, and in response to the request of the panel of the Court which heard argument in this case on March 15, 1965.

It is correctly stated in the appellee's supplemental Memorandum that the appellant's trial attorney, in open court, cross-examined the government's witness about prior written statements producible under the Jencks Act, 18 U.S.C. Section 3500 and that certain statements were furnished him in open court. The contention of the appellee's counsel seems to be that this cross-examination and production of statements under the Jencks Act formed a proper foundation upon which the prosecution could argue to the jury that the failure of the defense counsel to produce the statement in writing made to other persons by the government's witness corroborated his testimony. The question presented for appellate scrutiny is whether the substantial rights of the appellant were prejudiced by the manner in which the Jencks Act statements

were brought to the attention of the jury.

ARGUMENT

The purpose of the Jencks Act, 18 U.S.C. Section 3500, is to limit and regulate the defense's access to government papers and does not modify the rules of evidence regarding the admissibility and use of the statements once produced. Although the statute itself provides no procedure for making a determination whether a particular statement comes within its terms, the Supreme Court has approved the practice of having the government submit the statement to the trial judge for an in camera determination feeling that "any other procedure would be destructive of the statutory purpose". Palermo v. United States, 360 U.S. 343, 354 (1959). The Supreme Court in Campbell v. United States, 365 U.S. 85, 92 (1960) pointed out that under the circumstances of that case it was a required procedure that the Jencks Act inquiry be conducted by the trial judge without the jury present. Both this Court and the Tenth Circuit Court of Appeals have recognized that the hearings to discover whether there are "Jencks statements" should be conducted outside the jury's presence. Moore v. United States, 117 U.S. App. D.C. 254, 255, 328 F.2d 555, 556 (1964); Baring v. United States, 292 F.2d 53, 58 (10th Cir. 1961).

From the foregoing it is concluded that the incidents of the production of Jencks Act statements are to be kept, as far as

practicable, from the knowledge of the jury and by no stretch of the imagination would a motion in open court for the production of such statements form the foundation for a prosecutor's argument as to the contents of the statements or their probative value for the government's case. There was no foundation in the instant case for the prosecuting attorney to argue to the jury regarding the Jencks Act statements that:

"There is no difference, ladies and gentlemen, in these reports made at the time of the crime. They corroborate the testimony of the police officer from the witness stand." (Tr. 56).

Prejudicial information should not be permitted to reach the jury, whether it be from news accounts, Marshall v. United States, 360 U.S. 310 (1959), from audible bench conferences, Young & Simmons v. United States, D.C. Cir., Nos. 18615, 18662, March 19, 1965, or from improper arguments of the prosecuting attorney to the jury. A defendant's right to fair trial may be prejudiced by the conduct of the prosecutor, who in his closing remarks to the jury, indulges in an appeal wholly irrelevant to any facts in the case. Viereck v. United States, 318 U.S. 236, 247, (1943).

Permitting prosecuting attorneys to comment on the failure of defense counsel to utilize Jencks Act statements would have the practical effect of depriving some defendants access to such statements. As this Court has considered as a corollary to the privilege

of the defendant against self incrimination the prohibition against comment by counsel for the government upon his failure to testify, it should just as jealously protect the defendant's right to Jencks Act statements by prohibiting comment upon his failure to use them. Tomlinson v. United States, 87 U.S.App. D.C. 106, 110, 93 F.2d 652, 656 (1937).

Wherefore, it is respectfully submitted that the conviction of appellant should be reversed.

Respectfully submitted,

/s/ John P. Abshire
John P. Abshire
Counsel for Appellant

(Appointed by this Court)

1625 Eye Street, N.W.
Washington, D.C. 20006

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BRIEF FOR APPELLEE

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,915

GEORGE E. JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED FEB 18 1965

Nathan J. Paulson
CLERK

DAVID C. ACHESON,
United States Attorney.

FRANK Q. NEBEKER,
ALLAN M. PALMER,
Assistant United States Attorneys.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 18,915

GEORGE E. JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

MOTION TO AFFIRM OR DISMISS OR IN THE
ALTERNATIVE, THAT THE INSTANT MOTION
BE CONSIDERED AS APPELLEE'S BRIEF

Comes now the appellee by its attorney, the United States Attorney, and moves the Court that the instant appeal be dismissed as frivolous or that the judgment of the District Court be summarily affirmed. In the alternative, appellee moves that the instant motion be considered as appellee's brief.

Appellant was charged with the unauthorized use of a motor vehicle (22 D.C. Code § 2204) in a one-count indictment filed on July 6, 1964. On August 18, 1964, he was tried to a jury and found guilty of the offense. Appellant was sentenced to imprisonment for a term of twenty months to sixty months.

The testimony showed, that at approximately 8:30 p.m. on June 9, 1964, Richard Farmer parked his 1956 Oldsmobile sedan on the parking lot adjacent to 3421 - 18th Street, Southeast in the District of Columbia. He next saw his vehicle the following day at No. 4 police precinct while in the company of Metropolitan Police Officer Tyson Joliffe. Mr. Farmer was not acquainted with appellant, nor did he give him or anyone else permission to use the vehicle (Tr. 10-12).

Officer Joliffe testified that on June 10, 1964 between 1:30 and 2:00 a.m. he and a fellow officer were on duty in a scout car in the vicinity of the 800 block of Kentucky Avenue, Southeast (the other officer was driving) when he observed Mr. Farmer's Oldsmobile proceeding with only one headlight lit. When they attempted to stop the vehicle it raced off (Tr. 14-15). At the corner of 16th and G Streets, Southeast, the car halted to avoid colliding with a street light and the officers pulled up behind it. The Oldsmobile backed up striking the police vehicle, and Officer Joliffe jumped out and went over to the right side of the car. Seeing him there, appellant slid across the front seat, emerged from the driver's side and fled on foot (Tr. 15-16). When he emerged, the officer was three to four feet away from appellant and faced him directly (Tr. 40). Joliffe immediately gave chase, commandeering a vehicle during the extended pursuit. He apprehended Johnson in the middle of the 1400 block of D Street, Southeast (Tr. 16). During the course of the chase the witness had appellant under his continual observation save for a moment preceding the arrest when appellant rounded a corner (Tr. 38). As Officer Joliffe approached appellant, the latter fell to the ground from exhaustion, breathing very heavily (Tr. 41).

Johnson did not testify or offer evidence in his defense (Tr. 44). The jury returned its guilty verdict with dispatch (Tr. 77-79).

The only issue sought to be raised on appeal is the sufficiency of the evidence, i.e., whether appellant was adequately identified as the driver of the stolen vehicle. This issue however, is not preserved for appellant review as trial counsel specifically declined to move for a judgment of acquittal at the close of the Government's case (Tr. 44). Battle v. United States, 92 U.S. App. D.C. 220, 206 F.2d 440 (1953). Cf. Fed. R. Crim. P. 29(a). He was undoubtedly of the opinion that the testimony clearly presented an issue to be resolved by the jury. Examination of the record affirms the correctness of his judgment. Nor is there to be perceived in it even a discordant whisper of manifest error in the overall conduct of the trial. Cf. Battle v. United States, supra.

Wherefore, it is respectfully submitted that the appeal be summarily affirmed or dismissed as frivolous, or in the alternative, that the instant motion be considered as appellee's brief.

/s/ DAVID C. ACHESON

DAVID C. ACHESON
United States Attorney

/s/ FRANK Q. NEBEKER

FRANK Q. NEBEKER
Assistant United States Attorney

/a/ ALLAN M. PALMER

ALLAN M. PALMER
Assistant United States Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been mailed to attorney for appellant, John P. Abshore, Esq., 1625 Eye Street, N.W., Washington, D. C. 20006, this 8th day of January, 1965.

/s/ ALLAN M. PALMER
ALLAN M. PALMER
Assistant United States Attorney